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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CYNTHIA M. VARGAS,

Defendant and Appellant.

B297115

(Los Angeles County
Super. Ct. No. VA071988)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County. John A. Torribio, Judge. Reversed and remanded with directions.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Amanda V. Lopez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Cynthia M. Vargas appeals the summary denial of her petition for resentencing under Penal Code¹ section 1170.95. Vargas contends, and the Attorney General agrees, that because the record of conviction does not demonstrate that Vargas is ineligible for relief as a matter of law, the superior court summarily denied the petition in error. We agree and remand the matter to the superior court for further proceedings, including the appointment of counsel for Vargas and briefing by the parties in accordance with section 1170.95, subdivision (c).

FACTS AND PROCEDURAL BACKGROUND²

On July 12, 2002, James Barbosa (James) walked to Rivera Park to meet his brother, John Barbosa (John), and Pedro Brache. None was a member of any gang. The park, however, was in territory claimed by the Rivera gang, of which Vargas was an associate or a full member, and her codefendant, Cesar Alcantar, and 15-year-old Daniel Luna were members. As James walked over to join John and Brache, Alcantar blocked his path and repeatedly asked him where he was from. James understood Alcantar was asking whether he was from another gang, and James responded he was not from anywhere, meaning he was not a gang member. But Alcantar accused James of lying and punched him in the jaw. James turned and walked away to avoid

¹ Undesignated statutory references are to the Penal Code.

² We have granted the parties' requests to take judicial notice of the record in the appeal from Vargas's conviction in case No. B175349. Included in that record is this court's prior opinion in that case, from which our factual summary is drawn. (*People v. Alcantar et al.* (Apr. 20, 2005, B175349) [nonpub. opn.]; *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110 [appellate opinion is part of the record of conviction].)

any further trouble, and Alcantar, Vargas and Luna went to the back of the park where Luna painted gang graffiti along with his, Alcantar's, and Vargas's gang monikers on a wall.

A few minutes later, Alcantar, Vargas and Luna approached James as he was talking with John and Brache. Alcantar persisted in asking James where he was from and what he was called. James reiterated that he was not a gang member. Vargas, who was standing next to Alcantar, threw a tall beer can at James and said "Damn" when it only skimmed the side of his head. Alcantar struck James again, and a fight ensued.

James, who was larger and stronger than Alcantar, pushed Alcantar to the ground and got on top of him. James felt two people hitting and kicking him while he was on top of Alcantar. John attempted to separate James and Alcantar, and Brache saw John try to pull Vargas away as she was hitting and kicking James.

James continued to dominate the fight, and Vargas yelled to Luna, "Shoot. Shoot the motherfucker." A few seconds later Alcantar yelled, "Hurry up. Shoot this motherfucker." Luna pulled out a handgun, and John stepped between Luna and James. As John yelled, "Stop. Stop. No. No," Luna fired the weapon several times. One bullet struck John in the back. Luna then walked up to John and fatally shot him in the back of the head. The three assailants ran away with James in pursuit. Vargas and Alcantar got into one vehicle, Luna another, and they all drove away. An eyewitness testified that if John had not stepped between Luna and James, Luna would have shot James in the back while James was on top of Alcantar.

Following a jury trial, Vargas and Alcantar were convicted of first degree murder (§ 187, subd. (a)) with findings as to each

defendant that a principal used a firearm (§ 12022.53, subds. (d), (e)(1)) and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The trial court imposed a sentence of 60 years to life, consisting of 25 years to life for the first degree murder plus consecutive terms of 25 years to life for the firearm enhancement and 10 years to life for the gang enhancement.

On appeal from the judgment, this Court ordered the gang enhancement stricken but otherwise affirmed the conviction. The superior court modified Vargas's sentence to a term of 50 years to life.

Following the California Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), Vargas filed a petition for writ of habeas corpus in the superior court on the ground that she could not be convicted of murder in the first degree under the natural and probable consequences doctrine. Rather than retry the case, the People agreed to accept resentencing for second degree murder. The superior court vacated the first degree murder sentence and imposed a term of 40 years to life, consisting of 15 years to life for second degree murder plus 25 years to life for the firearm enhancement.

Shortly after Senate Bill No. 1437 became effective, Vargas filed her petition for resentencing pursuant to section 1170.95.³ The superior court summarily denied the petition without appointing counsel on the grounds that Vargas was a major

³ In her section 1170.95 petition, Vargas also asked the court to strike the related firearm enhancement under section 1385 based on section 12022.53, subdivision (h) as amended by Senate Bill No. 620.

participant in the fight, “threw a beer can at the decedent,” and yelled “‘shoot the motherfucker.’” The court found Vargas’s “entire conduct demonstrated beyond a reasonable doubt a reckless disregard to human life and complete indifference to her conduct.”

DISCUSSION

The Superior Court Improperly Denied the Section 1170.95 Petition Without Appointing Counsel to Represent Vargas or Allowing Briefing by the Parties

Section 1170.95, subdivision (c) requires the superior court to engage in a two-step review of a facially adequate petition for resentencing under section 1170.95. In the first step, the superior court must review the petition to determine if the petitioner has made a prima facie showing that she falls within the provisions of the statute; that is, that she may be entitled to relief. The parties agree that because Vargas made the requisite showing to satisfy the first step, she was entitled to the appointment of counsel, and the matter should be remanded for further proceedings in accordance with section 1170.95.

A. Senate Bill No. 1437 and section 1170.95

The Legislature enacted Senate Bill No. 1437 to “amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).) To accomplish this objective, Senate Bill No. 1437 amended section 188, defining malice, and section 189, which classifies murder into two degrees and lists the predicate felonies for the

crime of first degree felony murder.⁴ (Stats. 2018, ch. 1015, §§ 2, 3; *People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).)

Senate Bill No. 1437 and its amendment to section 188 “significantly restricted potential aider and abettor liability, as well as coconspirator liability, for murder under the natural and probable consequences doctrine, effectively overruling *Chiu* insofar as it upheld second degree murder convictions based on that theory. Now, rather than an objective, reasonable foreseeability standard, as discussed in [*People v.*] *Prettyman* [(1996) 14 Cal.4th 248] and *Chiu*, pursuant to new section 188, subdivision (a)(3), to be guilty of murder other than as specified in section 189, subdivision (e), concerning felony murder, the subjective mens rea of ‘malice aforethought’ must be proved: ‘[T]o be convicted of murder, a principal in a crime shall act with malice aforethought.’ (See also Sen. Bill 1437 (Stats. 2018, ch. 1015, § 1, subd. (g) [‘[a] person’s culpability for murder must be premised upon that person’s own actions and subjective mens rea’].) And that required element of malice ‘shall not be imputed to a person based solely on his or her participation in a crime.’ (§ 188, subd. (a)(3).)” (*People v. Lopez* (2019) 38 Cal.App.5th

⁴ The amendments to section 189 included the new requirement that a participant in a specified felony during which a death occurs may be convicted of murder for that death “only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] [or] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.” (§ 189, subd. (e)(1)–(3).)

1087, 1103, review granted Nov. 13, 2019, S258175; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135, review granted Mar. 18, 2020, S260598 (*Lewis*).)

In addition to these amendments, Senate Bill No. 1437 added section 1170.95 to provide a procedure by which those convicted of felony murder or murder under a natural and probable consequences theory may seek retroactive relief if they could no longer be convicted of murder because of the changes to sections 188 or 189. (*Martinez, supra*, 31 Cal.App.5th at pp. 722–723.) A petition under section 1170.95 must include the following allegations:

“(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

“(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

“(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.” (§ 1170.95, subd. (a)(1)–(3).)

In addition, the petition must include a declaration of eligibility based on the requirements of subdivision (a), the year of conviction and the superior court case number, and whether the petitioner requests appointment of counsel. (§ 1170.95, subd. (b)(1).) Subdivision (b)(2) provides that “[i]f any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another

petition and advise the petitioner that the matter cannot be considered without the missing information.”

If the petition contains all the information required under section 1170.95, subdivisions (a) and (b), subdivision (c) sets forth a two-step procedure, which the superior court must follow before issuing an order to show cause. (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 327–328, review granted Mar. 18, 2020, S260493 (*Verdugo*); *Lewis, supra*, 43 Cal.App.5th at pp. 1136, 1140, rev.gr.)

Section 1170.95, subdivision (c) provides: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.”

In interpreting section 1170.95, we must give meaning to all parts of the statute to the extent possible. (*Verdugo, supra*, 44 Cal.App.5th at p. 329, rev.gr.; *People v. Shabazz* (2006) 38 Cal.4th 55, 67 [“ ‘The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible’ ”].) “[T]he language used in a statute or constitutional provision should be given its ordinary meaning, and ‘[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary

to resort to indicia of the intent of the Legislature . . .’ [Citation.] To that end, we generally must ‘accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose,’ and have warned that ‘[a] construction making some words surplusage is to be avoided.’” (*People v. Valencia* (2017) 3 Cal.5th 347, 357; *People v. Abrahamian* (2020) 45 Cal.App.5th 314, 332.)

It is clear from the language of section 1170.95, subdivision (c) that in this next stage the superior court conducts two separate reviews of the facially sufficient petition before an order to show cause may issue: The first review is “made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief.” (*Verdugo, supra*, 44 Cal.App.5th at p. 328, rev.gr.)

B. Vargas made a prima facie showing that she falls within the provisions of the new law as required under subdivision (c) of section 1170.95

Vargas contends her petition for resentencing satisfied the requirements for the initial prima facie showing that she falls within the provisions of the statute and thus may be eligible for relief. Accordingly, the superior court erred in summarily denying her petition without appointing counsel and without briefing from the parties. We agree.

In the first prima facie review required by section 1170.95, subdivision (c), the superior court simply determines “whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner.” (*Verdugo, supra*, 44

Cal.App.5th at p. 329, rev.gr.) To conduct this review, the court may evaluate “documents [that are] in the court file or otherwise part of the record of conviction that are readily ascertainable.” (*Ibid.*; see also *Lewis, supra*, 43 Cal.App.5th at pp. 1137–1140, rev.gr.; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 897–899; *People v. Edwards* (2020) 48 Cal.App.5th 666, 673–674, review granted July 8, 2020, S262481; *People v. Torres* (2020) 46 Cal.App.5th 1168, 1173, 1178, review granted June 24, 2020, S262011; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57–58, review granted Mar. 18, 2020, S260410.⁵) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851; *In re Edward H.* (1996) 43 Cal.App.4th 584, 593 [“A ‘prima facie’ showing refers to those facts which will sustain a

⁵ The issue of whether a superior court may consider the record of conviction in determining whether a petitioner has made a prima facie showing of eligibility for relief under section 1170.95 is currently under review by the California Supreme Court. (<https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2311967&doc_no=S260598&request_token=NiIwLSEmXkw5W1BBSCMtSEJJUEw0UDxTJSJeUzNRMCAgCg%3D%3D> [as of July 7, 2020], archived at <<https://perma.cc/RV72-6SDZ>>.) Pending further guidance from our Supreme Court, we agree with these courts’ conclusions that section 1170.95, subdivision (c) permits the superior court to review the record of conviction as well as the averments of the petition, and may summarily deny the petition without the appointment of counsel if this initial review reveals that the petitioner is ineligible for relief as a matter of law.

favorable decision if the evidence submitted in support of the allegations by the petitioner is credited”].)

Vargas’s petition in this case satisfied the requirements for the initial prima facie showing under section 1170.95, subdivision (c). The petition alleges, and the record of conviction shows that the information charged Vargas with murder, the prosecution proceeded under alternate theories, including the natural and probable doctrine, and Vargas suffered a conviction for first degree murder following a jury trial, which was then reduced to second degree murder under *Chiu*. Presuming these facts to be true, and assuming Vargas could not now be convicted of first or second degree murder because of the changes to section 188,⁶ she would be entitled to relief under section 1170.95.

Vargas did not rely solely on the bare allegations of the petition, but also submitted documents from the record of conviction in support of her averments. Those documents also support the conclusion that Vargas made the requisite initial prima facie showing under subdivision (c) of section 1170.95.⁷

⁶ There is no indication in the record that Vargas was convicted under a theory of felony murder.

⁷ Specifically, Vargas attached excerpts from this court’s opinion in the original appeal, in which we described someone other than Vargas as the actual killer, and noted that the conviction could have been based on the natural and probable consequences doctrine. Vargas also submitted the reporter’s transcript from the resentencing hearing following Vargas’s petition for habeas corpus in support of the resentencing petition. At that hearing the People agreed that Vargas should be resentenced for second degree murder pursuant to *Chiu* because she could have been convicted of first degree murder under the natural and probable consequences doctrine.

In sum, the allegations in the petition, together with the documents submitted with it, were sufficient to meet Vargas's duty of making an initial prima facie showing that she falls within the provisions of the statute and may be entitled to relief. Because the superior court failed to follow the statutory procedures in denying the petition, its factual findings are not entitled to deference, and remand is warranted for further proceedings in accordance with section 1170.95, subdivision (c). On remand, the superior court is directed to appoint counsel as requested and accept briefing by the parties before proceeding to the determination of whether Vargas made a prima facie showing that she is entitled to relief. (See *People v. Endsley* (2018) 28 Cal.App.5th 93, 104 [remand appropriate where trial court failed to follow statutory procedures]; *People v. Rocha* (2019) 32 Cal.App.5th 352, 360 ["A remand is necessary to ensure proceedings that are just under the circumstances, namely, a hearing at which both the People and defendant may be present and advocate for their positions"].) Thereafter, if the court finds that Vargas has made the requisite showing, it must issue an order to show cause and proceed with a hearing in accordance with section 1170.95, subdivisions (c) and (d).

DISPOSITION

The postjudgment order is reversed. The matter is remanded to the superior court for further proceedings in accordance with section 1170.95, subdivision (c), including the appointment of counsel for Vargas and briefing by the parties.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.